

No. 6951.

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IN THE  
United States  
**Circuit Court of Appeals,**  
FOR THE NINTH CIRCUIT.

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Alma I. Wagner, Executrix of the  
Estate of Robert G. Wagner,  
Deceased,

*Petitioner,*

*vs.*

Commissioner of Internal Revenue,  
*Respondent.*

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BRIEF FOR PETITIONER.

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## BRIEF FOR PETITIONER.

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### Introduction.

This is an appeal from a final order of the United States Board of Tax Appeals affirming the action of the Commissioner of Internal Revenue in determining that there is a deficiency in income taxes for the year 1920 in the amount of \$13,380.44.

On October 19, 1927, the Commissioner of Internal Revenue, respondent, notified the petitioner by registered mail, in accordance with the provisions of section 274 of the Revenue Act of 1926, that his investigation of the

income tax return filed by Robert G. Wagner for the year 1920 disclosed a deficiency in tax in the amount above stated. The petitioner, as executrix of the Estate of Robert G. Wagner, deceased, filed a petition to the United States Board of Tax Appeals, contending that the Commissioner erred in his determination. Thereafter the proceeding came to trial before the Board and on June 26, 1931, the said Board of Tax Appeals promulgated its findings of fact and opinion, which are reported in 23 B. T. A. 879. On June 29, 1931, the said Board entered its final order sustaining the Commissioner's determination. Appeal from this order is brought to this court by petition for review filed December 16, 1931, pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926.

### Question Presented.

During 1920 Robert G. Wagner received \$42,500.00 from the sale of his one-half interest in a patent covering an invention known as Briterlite. Briterlite was invented by said Robert G. Wagner and his associate, Ernest J. Schweitzer, in 1912 and he claimed that the fair market value of said invention on March 1, 1913, exceeded the proceeds received from its sale and that, therefore, no profit was realized from said sale. The Commissioner contended that the invention had no value as of March 1, 1913, and that, therefore, the entire amount received in 1920, of \$42,500.00, was taxable as profit. The Board of Tax Appeals concluded that the evidence does not establish a fair market value for said invention as of March 1, 1913. The question therefore is whether there

is any evidence or support for the Board's conclusion, or whether the evidence conclusively proves a fair market value of said invention as of March 1, 1913. There is also a question as to whether the Board erred in excluding certain evidence as to said value.

### Statute Involved.

Revenue Act of 1918:

“Section 202(a)—That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be—(1) in the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; . . .”

### Statement of Facts.

The following statement of facts contains the *findings of fact* set forth in the Board of Tax Appeals decision in this case [R. 14], supplemented by references to the transcript of record:

The petition is filed in the name of Alma I. Wagner, as executrix of the Estate of Robert G. Wagner, deceased. Robert G. Wagner is hereinafter referred to as the decedent.

The decedent was an individual with office at 830 South Olive street, Los Angeles, California.

In 1911 the decedent and one Ernest J. Schweitzer were the owners of the stock of the Wagner-Woodruff Corporation, a corporation engaged in the business of manufacturing and selling electric lighting fixtures in Los

Angeles. About that time, due to the fact that a new type of gas light was brought out which was very bright, several kinds of indirect electric lighting fixtures appeared on the market. [R. 53, 75, 78 and 79.] Among these were the Brascolite, manufactured by the St. Louis Brass Works, and the Phoenix Light. Most of the commercial houses, General Electric, Edison Co., and others were putting in these indirect lighting fixtures. In 1912 and 1913 the Brascolite was the most popular one of these types of fixtures and was in great demand. At that time the Brascolite had been installed in a great many commercial buildings in Seattle, Denver, Salt Lake City, Chicago, Minneapolis, Detroit and the important eastern cities. This fixture is still in great demand. [R. 29, 30, 53, 58, 78, 79.]

This Brascolite fixture was an indirect lighting unit having a translucent globe inverted and a reflecting pan above it.

In 1912 Schweitzer and the decedent, working in the factory of the Wagner-Woodruff Corporation, invented an indirect electric lighting fixture which they called the Briterlite. This was a lamp mounted in a globe of translucent material and having above it a downwardly reflecting reflector of curved contour so as to diffuse the light downward. These lights were being manufactured and sold to a very limited extent in 1912 and 1913. In January or February, 1913, the decedent and Schweitzer had obtained a contract for the production and installation of a number of "Briterlite". [R. 29, 33, 35, 36, 51, 52.]

Schweitzer and the decedent in the latter part of 1912 consulted Frederick S. Lyon, an attorney at law, who, at that time, had been engaged for about 20 years in practicing exclusively in patent, trade mark and copyright matters, and who had represented decedent in a number of patent matters. Lyon caused an examination of the records of the patent office to be made and rendered to Schweitzer and the decedent an opinion or report as to the patentability of the Briterlite invention. He advised Schweitzer and the decedent that the Briterlite did not infringe the original Guth patent, which was the patent covering the Brascolite. The Guth patent had been originally in litigation and the original claims were held to a certain limitation. Subsequently, an application was made by the owner of the Guth patent for a reissue or amended patent on the Guth invention and a reissue was granted. The result was that while the Guth patent was sustained generally the rights of the decedent and Schweitzer could not be cut off because they were intervening rights, the decedent and Schweitzer having invested their money, made their application for patent, and gone into actual manufacture of the Briterlite. Decedent and Schweitzer were thus able to continue in the manufacture and sale of the Briterlite without regard to the fact that the reissue of the Guth patent shut out others who were not licensed. The only fixture in competition with the Brascolite and which did not infringe the Guth patent was the Briterlite, because of the intervening rights of the decedent and Schweitzer. [R. 29, 30, 31, 33.]

One of the material differences between the Briterlite and the Brascolite was that the upper reflecting surface

of the Brascolite or Guth patent was flat. The original Guth patent was limited to a flat upper reflecting surface and to the patent arrangement of the other reflecting surfaces with relation to it. The Briterlite differed essentially in that it had a curved pan at the top. It was not within the scope of the original Guth patent, although the reissued Guth patent did not limit the Guth invention in that same manner. The Briterlite also had three hooks on the bowl and the bowl could be more easily removed than the bowl on the Brascolite. The Briterlite was an improvement over other fixtures of the same type and could be sold readily in competition with them. [R. 63, 64, 67, 71, 72, 84.]

An application for patent covering the Briterlite fixture was filed some time during the year 1914 and a patent was thereafter granted about September 21, 1915.

The Briterlite was made in about eight different sizes and styles. In 1913 the best seller sold for from \$18 to \$20. In computing the sales list price for the Briterlite the cost of labor and material was taken as a basis cost and 50 per cent of this amount added for overhead. The retail selling price was double that amount. [R. 35, 54, 58.]

In 1920 the demand for these indirect lighting fixtures was not as great because a new type of glass had been invented which was thin in texture so as to allow maximum rays of light to pass entirely through the glass. This was very cheap to market. [R. 54, 57, 64, 86.]

In 1920 the decedent and Schweitzer sold the patent on the Briterlite fixture to the Wagner-Woodruff Cor-

poration for \$85,000. They each owned a one-half interest in this patent. The respondent determined that the decedent derived an income from this transaction in the amount of \$42,500.00.

In addition to the above facts, we respectfully submit that the evidence conclusively establishes as a fact that the fair market value as of March 1, 1913, of the Briterlite invention was at least \$100,000.00.

### **Assignments of Error.**

The petitioner assigns the following errors:

1. The Board of Tax Appeals erred in holding that the Briterlite invention had no fair market price or value on March 1, 1913.
2. The Board of Tax Appeals erred in holding that the evidence does not prove or establish a fair market value for said Briterlite invention as of March 1, 1913, there being evidence to the contrary in the record and from the testimony of witnesses.
3. The Board of Tax Appeals erred in not redetermining the deficiency in favor of the petitioner for the year 1920 and against the Commissioner.
4. The Board erred in excluding evidence of values, as set forth in the amended assignments of error filed in this proceeding.

## ARGUMENT.

### An Invention Is Property Which Is Marketable and Its Value Determinable.

Since the Board's decision indicates that there is difficulty in determining exactly the nature of the property right, if any, which is to be given a value as of March 1, 1913, we are devoting the first sections of this brief to the establishment and explanation of the property rights represented by the Briterlite invention, to prove that on March 1, 1913, Messrs. Wagner and Schweitzer, the inventors, had not only a mere invention but also certain exclusive rights tantamount to the exclusive rights made perfect and absolute by patent.

The Board of Tax Appeals, in its opinion filed in this proceeding, stated [R. 19]:

“Petitioner contends that an invention, prior to the time the patent is issued thereon and even prior to the date that an application for a patent is filed, is property capable of being valued, citing, among other cases, Hershey Manufacturing Co., 14 B. T. A. 867; Hendrie v. Sayles, 98 U. S. 546, and Butler v. Ball, 28 Fed. 754. However, in the view we take of the evidence in this proceeding, we do not deem it necessary to determine whether or not this contention of petitioner is correct.”

We respectfully submit that an invention is property and that it is marketable and can be valued.

Under section 8, article I, of the Constitution of the United States, Congress is granted the power to make all laws which shall be necessary and proper to promote progress of science and useful arts by securing for limited



times to authors and inventors the exclusive rights to their respective writings and discoveries. By virtue of this authority, Congress enacted laws regarding the issuance of patents and copyrights, providing thereby for the protection of the inventor an exclusive right to use, manufacture and sell his invention for a period of 17 years after issuance of patent.

Revised Statute, section 4886 (29 Stat. 692; U. S. Codes Ann. Title 35, sec. 31), provides:

“Inventions patentable. Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, may upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor.”

These laws presuppose the existence of an invention, a property which by their mandate they protect, in that by their provisions they restrain others from the manufacture and use of that invention.

The general law declares beforehand that the right to the patent belongs to him who is the first inventor, even before the patent is granted; therefore, any person who, knowing that another is the first inventor, proceeds to construct a machine, acts at his peril, with a full knowl-

edge of the law. Inventions, lawfully secured by letters patent, are the property of the inventors and, as such, the franchise and the patented product are as much entitled to legal protection as any other species of property, real or personal. *They are, indeed, property even before they are patented*, and continue to be such until the inventor abandons the same to the public. (*Butler v. Ball*, 28 Fed. 754.)

A patent is nothing more than the grant of certain protection. It is not the grant of any property. The government parts with nothing by the patent. It loses no property. Its possessions are not diminished. The patentee, so far as the present use is concerned, receives nothing which he did not have without the patent, and the monopoly which he receives under the patent is only for a limited period. His invention is his absolute property. He may withhold the knowledge of it from the public and he may insist upon all the advantages and benefits which the statutes promise to him who discloses to the public his invention. (*U. S. v. American Bell Telephone Co.*, 167 U. S. 226, 249, 250; see, also, *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *Fuller v. Berger*, 120 Fed. 274: "The inventor's right to make, vend and use his device does not come from the patent law. It is his natural right." *Motion Picture Patent Co. v. Universal Film Co.*, 243 U. S. 502.)

The term "property" as used in the statute (section 202(a), Revenue Act of 1918, *supra*) was not intended to be applied in a restricted sense. As stated by the Circuit Court of Appeals in the case of *Commissioner v.*

*Stephens-Adamson Mfg. Co.*, 51 Fed. (2d) 681 (affirming 16 B. T. A. 41):

“The word ‘property’ as used in the above referred-to sections of the revenue acts, should not be given a narrow or technical meaning. In *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 369, 45 S. Ct. 274, 275, the court said: ‘The general provision \* \* \* is that the deduction from gross income shall include a reasonable allowance for the “exhaustion \* \* \* of the property.”’ *There is nothing to suggest that the word ‘property’ is used in any restricted sense.*”

\* \* \* \* \*

“That one who has secured through assignment the application for a patent, or who has himself made a discovery of a patentable article, has a property right therein, is established by the facts that he may (35 U. S. C. A., sec. 47) sell and assign his application for a patent. *Sayler v. Wilder*, 10 Howard 477, 13 L. Ed. 504; *Cook v. Sterling Electric Co. (C.C.)*, 118 F. 45. *We think it a fair definition to say that what may be sold and assigned is property.*” (Italics ours.)

It is a matter of common knowledge that inventions are bought and sold and otherwise dealt in, even before patent is applied for or secured. (See *Stephens-Adamson Mfg. Co.*, 16 B. T. A. 41, where the invention was assigned before patent was applied for.) We believe that the testimony adduced in this proceeding, as recorded in the statement of evidence [R. 27], conclusively shows that an invention may be valued and that the value of the Briterlite invention as of March 1, 1913, was definitely determinable and established. That inventions may be

marketable is a fact of which the courts would undoubtedly take judicial notice. The amount of valuation proved by the evidence will be hereinafter discussed.

### The Property Right in an Invention Includes the Inchoate Right to Exclusive Use.

It is established law that an inventor has property which he may assign prior to patent. He has a property interest which he may sell or dispose of in any manner he may desire; and, further, *he has a property interest which carries with it the right to apply* for the protection which the law affords, to give to him an exclusive right for the use, manufacture and sale of his invention. (*Keystone Type Foundry v. Fast Press Co.*, 263 Fed. 99; *Nye Tool & Machine Works v. Crown Die & Tool Co.*, 276 Fed. 376.) As stated in *Hendrie v. Sayles*, 98 U. S. 546, 551:

*“Bona fide inventors’ rights are never derivative, and they, even before the patent is issued, have the exclusive inchoate right not only to the original patent . . . but to any reissue. . . . Authorities to support that proposition are numerous and decisive, and it is equally clear that they may sell, assign or convey the invention, including the inchoate right to obtain the patent \* \* \*”* (Italics ours.)

In the case of *Gayler v. Wilder* (10 Howard 476, 13 L. Ed. 504), the first question considered was whether an assignment of an invention before the patent issued, with a request that patent be issued to the assignee, conveyed to the assignee the legal right to the monopoly subsequently conferred by the patent. The court ruled

that, although it was true that an inventor had no absolute right to exclusive use of his invention until he obtained a patent, "*the discovery of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires.*" The court pointed out that although the Act of Congress (Act of 1836) declares that every *patent* shall be assignable in law, the thing to be assigned is the monopoly which is conferred by the patent and that therefore "*when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent issued, is equally within the provisions of the Act of Congress.*"

**The Inchoate Right to Exclusive Use Exists From the Time of First Public Use or Sale of the Invention to the Date of Issue of Patent, Provided, Application for Patent Is Made Within Two Years From the Time of Said First Public Use or Sale, and There Is No Abandonment.**

Under section 4886 of the Revised Statutes, *supra*, an inventor is allowed two years from the time his invention is first devoted to public use, or on sale, within which to file application for patent. As first inventor and first user of an article, he has the right to exclude others from the use of his invention, provided he files his application for patent within two years from the time of the first public use of the invented article. During that two-year period, therefore, he is vested with that inchoate right to exclusive use of his invention and

he has also the exclusive privilege during that period to file application for patent and to proceed as required by law, to perfect and make absolute his inchoate right. When that right is made absolute, his monopoly or right to exclusive use extends not merely from the date of application of patent, but from the date of first public use or sale of the invented article. (See *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 82 Fed. 327; also *Gaylor v. Wilder*, *supra*, p. 9.)

**On March 1, 1913, Robert G. Wagner and Ernest Schweitzer Had the Right to Exclusive Use of Their Briterlite Invention and the Value of the Invention Would and Should Reflect and Include the Value of Those Rights.**

The Board of Tax Appeals found as a fact that the lights under the Briterlite invention were being manufactured and sold to a very limited extent in 1912 and 1913, and that in January or February, 1913, Robert G. Wagner and Ernest Schweitzer had obtained a contract for the production and installation of a number of "Briterlite". [R. 16.] The Board also found that an application for patent covering the Briterlite fixture was filed some time during the year 1914 and a patent was thereafter granted about September 21, 1915. [R. 17.] The Board concluded, however, that at March 1, 1913, Robert G. Wagner and Schweitzer did not have exclusive right to manufacture and sell the Briterlite, since no patent had been granted thereon. [R. 19.]

The granting of the patent is *prima facie* evidence that the invention it protects was not in public use or on sale for more than two years prior to the filing of the applica-

tion on which it is based, and that there was no abandonment during that period of the invention. (*Mast, Foos & Co. v. Dempster Mill Mfg. Co. (supra)*, 82 Fed. 327, 331.) It is therefore obvious that from 1912 to 1914 the inventors had the right to exclude others from the use of the Briterlite invention, and that on March 1, 1913, they possessed the inchoate right to the exclusive use of the Briterlite and had at that time the exclusive privilege of making application for patent covering the Briterlite invention.

In the *Gayler v. Wilder* case, *supra*, the United States Supreme Court held that an assignment of an invention before patent issued and while the assignor was possessed of the inchoate right to a monopoly, carried with it an assignment of the right of monopoly which was made absolute by the later issue of patent. Therefore, if Robert G. Wagner and his co-inventor, Schweitzer, had sold their invention on March 1, 1913, they would have sold not only the new discovery but also the right of monopoly which they then possessed and which became absolute and perfect when the patent issued.

We will hereinafter show that the courts and the Board of Tax Appeals have consistently recognized the right to value applications for patent. In this proceeding the Board endeavors to penalize the taxpayer because he took advantage of the time permitted by law for the filing of application without prejudice to the inventor's rights to patent. Certainly an inventor is vested with the same property right regarding his invention during this two-year period before application for patent as he is after the application for patent is filed and during

the period it is pending before patent issues. The postponement of the filing of application for patent to the Briterlite invention was not only good business policy but also a delay which was actually valuable.

As stated by the United States Supreme Court in the case of *U. S. v. American Bell Telephone Co.*, 167 U. S. 226, 246, 247:

“Neither can a party pursuing a strictly legal remedy be adjudged in the wrong if he acts within the time allowed, and pursues the method prescribed by the statute. If the statute gives him five years within which to bring an action on a note he cannot be denied relief simply because he waits four years and eleven months. If he has two years after a judgment against him within which to take an appeal he may wait until the last day of the two years. Under U. S. Rev. Stat., paragraph 4886, an inventor has two years from the time his invention is disclosed to the public within which to make his application, and unless an abandonment is shown during that time he is entitled to a patent, and the patent runs as any other patent for seventeen years from its date. He cannot be deprived of this right by proof that if he had filed his application immediately after the invention the patent would have been issued two years earlier than it was, and the public therefore would have come into possession of the free use of the invention two years sooner. The statute has given this right, and no consideration of public benefit can take it from him. His right exists because Congress has declared that it should. It will not do to say that because Congress has declared that seventeen years is the life of a patent, seventeen years is the limit of the possible monopoly;



*for the same legislation that gives seventeen years as the life of a patent gives two years within which an application for a patent may be made, and during that time, as well as while the application is pending in the department, the applicant has practically, if not legally, an exclusive use. A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions, not of natural, but of purely statutory, right. Congress, instead of fixing seventeen, had the power to fix thirty, years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.” (Italics ours.)*

When it is considered that on March 1, 1913, Wagner and Schweitzer had a patentable invention [testimony of Mr. Lyons, R. pp. 29, 30, and the conclusive presumption raised by actual issue of patent, which cannot be collaterally attacked, *Joseph Adams v. Commissioner*, 23 B. T. A. 71, 103], and that on March 1, 1913, they had the inchoate right to exclusive use of the invention, and that on March 1, 1913, they could, by assigning the invention, have assigned the inchoate right of monopoly which then existed and also the absolute right of monopoly later to be secured by the patent (*Gayler v. Wilder, supra*), *the only reasonable conclusion which could be deduced would be that any sale on March 1, 1913, of the Briterlite invention would have been a sale of the invention together with the exclusive right to manufacture and sell thereunder. (U. S. v. American Bell Telephone Co., supra.)*

The mere invention alone, as in a case where it would be deemed to have been abandoned because of failure to apply for patent within two years from date of first public use, would generally be of no value to a prospective purchaser. But that situation did not exist in the instant case. What Wagner and Schweitzer had to sell on March 1, 1913, was not only the Briterlite invention but also a monopoly as to its use.

It is the general policy of the courts to apply a reasonable interpretation to a state of facts rather than an unreasonable one. Since the evidence shows that on March 1, 1913, the Briterlite invention was very valuable, and was patentable, any purchaser of that invention on March 1, 1913, would have perfected the inventors' right by proceeding to patent. Consequently any such purchaser would be purchasing not only the Briterlite invention but the exclusive rights thereunder.

In the case of *Stephens-Adamson Mfg. Co. v. Commissioner (supra)*, 16 B. T. A. 41, one Stephens invented a belt conveyance carrier in the latter part of 1911. On *November 29, 1911*, he assigned all his rights in this invention to the petitioner for a consideration of one dollar. On *December 4, 1911*, the patent application of Stephens was filed and on *February 5, 1918*, the patent was issued. The Board allowed the petitioner a March 1, 1913, value for the patent application of \$500,000.00. Supposing the petitioner in that proceeding had not filed the application for patent until after March 1, 1913, would the rights which he had acquired from Stephens by the assignment of November 29, 1911, have been any the less valuable on March 1, 1913, merely because the

petitioner was taking advantage of the two-year period before filing application for patent? Every bit of the evidence introduced in that proceeding to prove the value of the patent application would have been of equal weight, materiality and applicability as proof of the value of the invention on March 1, 1913, and that value could not possibly have differed from the value determined by the Board as the value of the patent application.

**The Courts and the Board Have Recognized That Applications for Patent Are Items of Property Which May Be Valued.**

We have been unable to find cases involving exactly the situation existing in this case. However, we believe that the instant case presents a similar proposition to that involved in determining whether applications for patent pending on March 1, 1913, might be valued for depreciation purposes and as a basis for determining gain or loss upon subsequent sale.

In the case of *Individual Towel & Cabinet Service Co. v. Commissioner*, 5 B. T. A. 158, the Board held that applications for patents were property which might be valued. This case has been consistently followed by the Board. (*Empire Machine Co.*, 16 B. T. A. 1099; *Stephens-Adamson Manufacturing Co. (supra)*, 16 B. T. A. 41; *Keystone Steel & Wire Co.*, 16 B. T. A. 617; *Coca-Cola Bottling Co.*, 6 B. T. A. 1333; *National Piano Manufacturing Co.*, 11 B. T. A. 46; *Hershey Manufacturing Co.*, 14 B. T. A. 867.) The Circuit Court of Appeals affirmed the decisions of the Board on this question in *Commissioner v. Stephens-Adamson Mfg. Co.*, *supra*, 51 Fed. (2d) 681, and *Commissioner v. Hershey Mfg. Co.*, 43 Fed. (2d) 298.

**Wagner's and Schweitzer's Rights on March 1, 1913,  
Under Their Invention Were Equally as Valuable  
as Their Rights Under an Application for Patent  
on That Day Would Have Been. And Their  
Rights Were Tantamount to Rights Under a  
Patent.**

As hereinbefore pointed out, Messrs. Wagner and Schweitzer invented and first devoted to public use their Briterlite invention in the latter part of the year 1912. They, therefore, under the patent laws, had until 1914 within which to file application for patent to protect the future use of their patent and to secure the monopoly which the patent laws would grant them. In 1914 they did file application for patent, and in 1915 patent was granted to them. This proof, in itself, shows that on March 1, 1913, these men had a patentable invention and also substantiates the advice given them by Mr. Lyon, their attorney, prior to March 1, 1913, that their invention was patentable. Messrs. Wagner and Schweitzer, therefore, had, on March 1, 1913, as valuable a property right represented by their invention as an application for the Briterlite patent would have been had it existed at that time.

Therefore, as we have hereinbefore argued in our discussion of the *Stephens-Adamson Mfg. Co.* case, (*supra*, p. 20), if an application for Briterlite patent would have been property subject to valuation on March 1, 1913, had it existed at that date, certainly a property interest of equal standing represented by the Briterlite invention, and the right on March 1, 1913, to apply for a patent of that invention (*Hendrie v. Sayles, supra*), was equally

entitled to be valued as a property right as the application for patent would have been. Even in the case of an application for patent, the property value is in the invention, not in the application.

In the instant case we have the testimony of the inventor's patent attorney to the effect that he caused an examination of the patent office records to determine the patentability of the invention, and that, as a result of that examination, he found the invention to be patentable and so advised Messrs. Wagner and Schweitzer, the inventors. We have his testimony that, inasmuch as the law permitted two years within which to file the application for patent, the application was not made until 1914. [R. 28.] We have also in the case the fact that the patent was issued in 1915. The Briterlite invention was undoubtedly property owned by Messrs. Wagner and Schweitzer—property which they could have sold or otherwise disposed of and property which was exceptionally valuable. (*U. S. v. American Bell Tel. Co., supra.*)

Although this invention was patented at the time it was sold in 1920, the patent added nothing more to the property which was owned by Wagner and Schweitzer on March 1, 1913, than a right to restrain by court action an infringement of others upon the use of the invention and, on March 1, 1913, Wagner and Schweitzer had a right which was granted them by law to protect their invention by applying for this patent. (*Hendrie v. Saylor, supra.*) *They had rights tantamount to rights under a patent.*

In the case of *Stephens-Adamson Mfg. Co. (supra)*, 16 B. T. A. 41, the invention was perfected and the

application for patent was made in 1911, but the patent was not issued until 1918. Yet, the Board permitted the establishment of a March 1, 1913, value of the patent application, and the Circuit Court of Appeals, in affirming the Board (*supra*, 51 Fed. (2d) 681), stated:

“It follows, too, that if one may have a property right, within the meaning of the Revenue Act, in and to a pending application for a patent, the basis (cost or fair market value as of March 1, 1913) for determining exhaustion must be fixed as of the day he acquired such right. Section 204(a), (b), Revenue Act of 1926, 26 U. S. C. A., sec. 935. Here the right was acquired in 1911, and, therefore, the fair market value as of March 1, 1913, rather than its cost price, must be used as the basis for determining depreciation or exhaustion.”

Wagner's and Schweitzer's rights were acquired in the latter part of 1912 at the time of the first public use of their invention. They were, therefore, entitled to use the March 1, 1913, value of their invention as a basis for determining the gain or loss from the sale in 1920.

In a number of the cases where the Board allowed March 1, 1913, values for application for patent, the patent was not actually issued until several years after that date. (*John Douglas Co.*, 23 B. T. A. 1308—patent not issued until 1915; *Stephens-Adamson Mfg. Co.* (*supra*), 16 B. T. A. 41—patent not issued until 1918; *Individual Towel & Cabinet Service Co.* (*supra*), 5 B. T. A. 158—patent not issued until 1915; *Empire Machine Co.* (*supra*), 16 B. T. A. 1099—patent not issued until 1915-1916.)

In the case of *Joseph H. Adams*, 23 B. T. A. 71 (now pending in Circuit Court of Appeals), the applications filed in 1909 were actually in a state of rejection by the Government Patent Bureau on March 1, 1913, and patent was not granted until 1920. Yet the Board allowed a March 1, 1913, value of the applications for patent of \$750,000.00.

It appears indisputable that if the Board could determine a value for the patent applications in the Joseph H. Adams case under the facts which therein existed, and in the other cases hereinbefore mentioned, the Board committed grave error in refusing to determine a value as of March 1, 1913, of the Briterlite invention.

**The Evidence Is Sufficient to Establish the Fair Market Value as of March 1, 1913, of the Briterlite Invention.**

The witnesses (whose competency and qualifications we will hereinafter discuss) introduced in this proceeding before the Board supported their opinions of value by careful consideration of all factors entering into the determination of value of an invention. Either the witness was personally familiar with those factors as they existed on March 1, 1913, or he was advised thereof by proper hypothetical questions.

The superiority of the Briterlite over other lights was established [R. 17, 63, 64, 67, 71, 72, 84]; the demand on March 1, 1913, and the expected future demand, of the Briterlite type of light was established, as was the reason for that demand explained [R. 15, 18, 53, 54, 57, 64, 75, 78 and 79]; the patentability of the invention

was established [R. 29, 30, and presumption raised by actual issuance of patent—also proof of general reputation and understanding in the trade that Wagner and Schweitzer had a patentable invention, R. 76] (see *Joseph H. Adams*, 23 B. T. A. 71); the rate of profit on manufacture of the Briterlite was established [R. 18, 35, 54, 58]; the expected royalty rate under licensing agreements was established [R. 64, 85]. The witnesses gave consideration to these factors in arriving at their opinion of the March 1, 1913, value of the Briterlite invention.

That it was proper that these factors be considered has frequently been established by judicial decision. In the case of *Sumter Coca-Cola Bottling Co.*, 7 B. T. A. 890, the Board recognizes the testimony of an expert witness, because he was familiar with the factors entering into the determination of the value of a franchise. The Board stated:

“Charles V. Rainwater, secretary and treasurer of the Coca-Cola Bottling Co. of Atlanta, which controlled the bottling rights for Coca-Cola in a number of states, testified that he had been such secretary and treasurer since 1906 and had supervision of the making and approving of all contracts and sub-contracts involving the right to bottle and sell Coca-Cola in the territory controlled by his company. He was familiar with the amount of Coca-Cola syrup consumed in each territory and the profits realized by the bottlers, and had bought and sold franchises on his plants. He stated that originally selling rights for Coca-Cola were given away in order to induce and stimulate the use of that product, but that by 1913 the franchises or rights to sell in certain territories had become very valuable and that he con-



sidered a first line contract or state right had a value of \$5 for each gallon of syrup consumed in the territory per year, and the sub-contract, such as the one involved here, a value of \$2 for each gallon of syrup consumed in the territory per year. The average consumption of syrup in the Sumter plant territory during the years 1911, 1912 and 1913 was 11,811 gallons, and he considered the franchise right to that territory worth \$25,622 when it was acquired by the petitioner in 1913.”

It will be noticed from this language that the Board recognized that in determining the value of a franchise for bottling and selling Coca-Cola, that value could properly be based upon the demand for the product and the royalty unit which might have been procured for the granting of a right to manufacture and sell under that franchise.

In the case of *Mossberg Pressed Steel Corporation*, 9 B. T. A. 1161, the Board determined the value of a patent from testimony which it described as follows:

“Relative to the patent assigned by Mossberg to the petitioner on September 24, 1919, we have found that with the exception of one carrier the carrier produced under the Mossberg patent was in several respects superior to the old style carriers then being manufactured. While no carriers had been manufactured under the patent there was at the time the petitioner acquired it an established market for braider carriers. There were at least five million then in use and a portion of them had to be replaced either with the old style carrier or with the Mossberg carrier, which was a superior article. A witness for the petitioner, who is an employee of the New

England Butt Co. and who was familiar with the various types of carriers manufactured and sold in 1919, expressed his opinion as to an actual cash value of \$40,000 on September 24, 1919, of the patent. Mossberg, who had had long experience in obtaining and disposing of patents, testified as to a value of \$50,000. In view of all the evidence of the case we are of the opinion that the patent had an actual cash value of at least \$40,000 at the time it was assigned to the corporation.”

It will be noted from this opinion that the Board considered the type of the invention which was being patented, the demand, or the estimated, anticipated demand for the patented product, and the opinion of the value of the patent as expressed by an expert witness who was familiar with the other factors.

In the case of *Dowagiac Manufacturing Co. v. Minnesota Moline Plow Co.*, 235 U. S. 641, 648, the United States Supreme Court permitted the use of an estimated royalty basis as expressed by the opinion of expert witnesses as a basis for determining the value of a patent, and commented upon the subject in the following terms:

“So, had the plaintiff pursued a course of granting licenses to others to deal in articles embodying the invention, the established royalty could have been proved as indicative of the value of what was taken, and therefore as affording a basis for measuring the damages. *Philip v. Nock*, 17 Wall. 460, 462, 21 L. Ed. 679; *Bridsall v. Coolidge*, 93 U. S. 64, 70, 23 L. Ed. 802, 805; *Clark v. Wooster*, 119 U. S. 322, 326, 30 L. Ed. 392, 395, 7 Sup. Ct. Rep. 217; *Tilghman v. Proctor*, 125 U. S. 136, 143, 31 L. Ed. 664, 666, 8 Sup. Ct. Rep. 894. But, as the patent had been

kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved. Not improbably such proof was more difficult to produce, but it was quite as admissible as that of an established royalty.”

In the case of *Ball-Bearing Roller Co.*, 15 B. T. A. 62, the Board, in placing a value upon an application for letters patent, accepted the testimony of an expert witness after being advised of the prospective demand for the invention and of the practicability of the use of the invented article.

In the case of *Sanitary Co. of America v. Commissioner*, 34 Fed. (2d) 439, the Circuit Court of Appeals pointed out the testimony of the witness whose opinion was accepted as establishing the value of the patent, to the effect that a certain invention, upon which patent was secured, could be made at a cost of \$.55 to \$.58 and sold at \$1.05 to indicate the profit that could be derived by the manufacture of the patented article.

In the *Stephens-Adamson Manufacturing Co.* case, *supra*, the Board in valuing a patent application permitted the introduction of evidence of the practicability of the invention, and considered that evidence as a basis for determining value. In its opinion in the case, the Board decides,

“We have found the value of the invention and application to have been \$500,000 on the date of its acquisition by the petitioner. . . . In *Individual Towel & Cabinet Service Co.*, 5 B. T. A. 158, we held

that the petitioner therein was entitled to an annual deduction for exhaustion of his patent, computed upon the basis of the March 1, 1913 value of the invention and application for patent thereon and a 17-year life of such patent, starting with the actual date of the existence of such patent.”

In the case of *Keystone Steel & Wire Company, supra*, the Board also discussed the merits of the invention and the possibilities of the demand for the invented article for which application for patent was pending, and determined that the invention and application had a fair market value on March 1, 1913, of \$200,000.00. The only evidence in support of the value of the patent application in that case was the testimony of the petitioner’s president, patent attorney, who assisted in securing the patent, and of two individuals connected with other companies engaged in manufacturing wire fence.

### Testimony of Witnesses Can Not Be Ignored.

In the instant proceeding the witnesses called upon to testify as to the value of the Briterlite invention gave well qualified and supported opinions of that value. It is the only evidence in the record. The respondent introduced no evidence to rebut their testimony. The general rule, as stated by the Board in the case of *Anita M. Baldwin*, 10 B. T. A. 1198, is applicable and should have been applied by the Board to this proceeding:

“If the evidence adduced by one party in support of a proposed valuation is clear, convincing and uncontradicted and no reason for disbelieving or discounting such evidence is present, and if the adverse

party neither weakens the testimony by cross-examination nor produces any evidence on his own behalf, the party producing the evidence should prevail.”

In the case of *John Douglas Co. v. Commissioner*, 23 B. T. A. 1308, the only question involved was the March 1, 1913 value of patent applications filed in 1910 upon which patents were not granted until 1915. The petitioner introduced two witnesses who testified concerning the practicability of the machine covered by the application for patent, the general demands of the industry at the time, the unique character of the invention, the peculiar need of the industry for such a machine, and the amount of royalties obtainable through licensing the use of the invention. The witnesses testified that the value of the inventions and applications for patent thereon on March 1, 1913, was from \$1,750,000 to \$2,000,000. The Board after quoting the above stated rule, concluded that the evidence established a value of \$1,750,000 on March 1, 1913.

**The March 1, 1913, Value of the Briterlite Invention as Established by the Evidence Was at Least \$100,000.00.**

The Board of Tax Appeals found as a fact that in 1920 the demand for the Briterlite type of indirect lighting fixture was not as great as in 1913. [R. 18.] This fact was testified to by the witness George J. McKenzie [R. 54] and the witness Frank N. Cooley [R. 86], and mentioned by the witness Max Gordon [R. 64]. The witness McKenzie also testified that the *value* of the Briterlite invention was greater on March

1, 1913, than in 1920. [R. 57.] There is the indisputed fact that in 1920, Wagner and Schweitzer sold their Briterlite invention and patent for \$85,000.00. On these facts alone, which were found to be facts by the Board, it was established that the Briterlite invention had a value on March 1, 1913, of at least \$85,000.00. In addition there was other competent evidence establishing value.

The witness Ernest J. Schweitzer, who with Wagner was co-inventor of the Briterlite fixture, testified that the invention had a March 1, 1913 value of \$100,000.00, as follows:

“Q. What, in your opinion, was the fair market value on March 1, 1913, of your Briterlite invention and the exclusive right to manufacture and sell that lighting fixture known as ‘Briterlite’?

The Member: If you know, or rather, if you can answer that question. Do you understand the question?

The Witness: Yes, sir.

The Member: Can you answer it?

The Witness: I put my value on it at that time; is that what you want, Judge?

The Member: No, that is not the question; just read the question again.

(The pending question was thereupon again read by the reporter.)

The Member: Now, you see, that asked about what the market value was of the property described in the question. Now, the first question I am going to ask you this, is whether or not you know what the market value of this invention was,—these rights set forth in the question,—we are not talking about what

you think it was worth,—the question is what the market value was, now, do you know?

The Witness: Well, I could not answer that that way, Judge, because we put a price on the Briterlite at one hundred thousand dollars.

The Member: Then, that is just your own value?

The Witness: Mr. Wagner and I.

The Member: Now, that is your own value; that is not the question, then, of what the market value was, is it?

The Witness: Well, we never put it on the market for sale.

The Member: So you do not know what the market value of those patents was, is that true—those inventions?

The Witness: It might have been the same as the Brascolite; the Brascolite made three million dollars and perhaps more.

The Member: Just answer my question: *You say this value of one hundred thousand dollars is the value that you and your associate Mr. Wagner fixed?*

The Witness: Yes, sir.

The Member: *That is what you thought it was worth?*

The Witness: Yes, sir.

The Member: But you did not know,—you did not take into consideration in fixing that value as to what the market value of the invention and the rights were, is that right?

The Witness: We did not have it up for sale, no.

The Member: So this figure of one hundred thousand dollars is your own estimate and that of Mr. Wagner?

The Witness: Yes, sir.

The Member: Of what this invention and these rights were worth, as of March 1, 1913, is that right?

The Witness: Yes, sir.” [R. 84, 49, 50.]

In summary, Mr. Schweitzer testified that in 1912 and 1913 Mr. Wagner and himself, as inventors of the Briterlite fixture, placed a value on their invention *at that time* of \$100,000.00. This testimony is very valuable and of great weight, since it shows that on or about March 1, 1913, the inventors appreciated the value of their invention and actually placed upon it an estimate of its value at that time, namely, \$100,000.00. It reflects a value of the invention placed upon it before there could be any question that future developments might have influenced an opinion of its value. [R. 49.]

The witness Max Gordon testified, first, that though he or his company never sold the Briterlite fixtures, they would like to have sold them, since he knew that at that date there was considerable demand for that fixture. [R. 59, 60.] When asked whether he could express an opinion as to the value as of March 1, 1913, of the Briterlite invention, he answered in the affirmative and, upon further question, stated: “If I were to estimate the value of that patent, if I could have had it at that time, I would have been willing to pay about \$75,000 to \$100,000 for it, because I know the demand was great.” [R. 63.] As the basis for this valuation, he testified that it was his opinion that there could be sold at that time 10,000 fixtures a year, that he would have been willing to pay \$1.00 per unit as a royalty for the exclusive right to sell



the invented article, "even for California," and that he would estimate a ten-year economic life of the invented or patented article; that with these factors he could express a value of from \$75,000 to \$100,000 for the invention as of March 1, 1913. It is important to note that Mr. Gordon's value is based solely on the value of the invention for use and distribution on the Pacific Coast alone. He confined his expression of value to this limit, because he had no personal knowledge of the extent of the distribution which might be made of the product in sections of the country other than the Pacific Coast. [R. 57 to 65.]

The witness Jerome Fugate testified that he could express an opinion of the value of the Briterlite invention on March 1, 1913. [R. 70.] His answer giving this value was stated in the following words:

"The Witness: Well, I would first, of course, have to base the value of such a right to manufacture on what the supply and demand for the production in question would be. The only thing I would have to base such an estimated value upon would be, naturally, upon my knowledge of the distribution possibilities, based on past experience of a similar type fixture in the United States, in general, distribution possibilities, in other words. I would say that in my experience with the Capitol Electric Company of Salt Lake City, where we operated this chain of twenty-one stores, that I made reference to using that as a basis; the average sales of those institutions ran very close to ten thousand a month; they were not large institutions—about half of their sales were based upon commercial fixtures,—store lighting fixtures,—office building fixtures, and so on. This

Brascolite had absolutely been the only unit that could be sold in this territory, coming into Los Angeles, I found the Briterlite invention here in use and it offered a highly competitive fixture which could readily be sold in competition with the Brascolite, and it would have been little or no problem whatever for any manufacturer to have easily reached a distribution of one hundred thousand units per year in the United States. I would base that upon the average of sales for an average store,—an average institution running around one thousand units per year; it would not be very difficult to obtain one hundred of such distributing points in this country; I would say a very fair market value for the privilege of manufacturing such a fixture would have been, at a minimum, one hundred thousand dollars.” [R. 71, 72.]

Upon cross-examination, he was asked:

“Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite and putting—placing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date,—you would have been willing on that date to have paid \$100,000 for the Briterlite invention?”

To this question, Mr. Fugate answered, “I did.” [R. 75.]

The witness Frank N. Cooley testified that the March 1, 1913 value of the invention was \$300,000.00. [R. 85.] When asked to give the basis for his opinion he answered as follows:

“A. I would base that on an estimate of possibly five thousand units in this territory, which would be approximately fifteen thousand units for the Coast, which, under our system of estimating the entire country is ten per cent of the entire country’s demand for that class of stuff, and that would give about 150,000 units. *From experience that I have had in attempting to market an invention*, I find that the prevailing royalty basis is approximately five per cent of the manufacturing cost; the manufacturing cost of one of those units, I would say, the average cost, would be about ten dollars, which would be about fifty cents a unit, at fifty cents a unit, a million and a half units would figure around \$750,000. In my estimation, due to the fact that you have ten years of practical life of the patent,—the other seven you might be getting started and competition may come up, but by discounting that fifty per cent it still brings it down to \$375,000; that is how I roughly estimate the market value of the invention. By the Member:

Q. As of March 1, 1913?

A. *Yes, because that was the time when it was very valuable; it is not now, because of all of the competition.* [R. 85, 86, 87.]

That Mr. Cooley’s opinion of the value of the Briterlite invention is not inconsistent with the value expressed by the other witnesses, even though triple in amount, may readily be appreciated from the fact that Mr. Cooley’s experience familiarized him with a market which was much more extensive than the market within the knowledge of the other witnesses. Mr. Fugate was familiar with market conditions as he became acquainted with them through an organization whose distribution

comprised four states. Mr. Gordon's familiarity of market conditions was limited to the Pacific Coast as the market with which he was acquainted. Mr. Cooley, however, was acquainted with an extensive organization, distributing lighting fixtures over the entire United States through more than 60 distribution houses. It is, therefore, obvious that Mr. Cooley could appreciate much greater possibilities of an invention, such as the Briter-lite invention, because of his familiarity of a much larger distribution or market.

This comprises the entire record of the testimony as to value. Nowhere is there the slightest intimation that the invention had no value on March 1, 1913. True, such a conclusion is established at the commencement of the trial by the presumption in favor of the Commissioner's determination. But such presumption is rebuttable and when reasonably convincing evidence is introduced to prove the contrary, the burden shifts upon the Commissioner to introduce evidence to support his determination. *Royal Packing Co. v. Commissioner*, 22 Fed. (2d) 536. Since the evidence introduced by the petitioner not only proved that the Commissioner erred in his determination that the invention had no value on March 1, 1913, but also proved that such value was actually not less than \$100,000.00, and since the Commissioner introduced absolutely no evidence to impeach or contradict the petitioner's witnesses, the Board erred in ignoring the evidence and sustaining the Commissioner.

## The Witnesses Were Qualified to Express an Opinion of Value and the Board Was Required to Find a Value From the Evidence.

It is extraordinary that it was possible to discover and introduce before the trial Board such a group of witnesses as well qualified and competent to express an opinion of value of an item of property as unique as the one involved in this proceeding, as were introduced to the Board of Tax Appeals in the hearing on this case. The Board committed serious error in refusing to give any weight or credence whatever to the testimony of these witnesses. The Circuit Court of Appeals has been ready to correct such errors by reversing the decisions of the Board in such cases. That the witnesses were well qualified and competent to testify as to the matters they were called upon to testify can hardly be doubted.

The witness Frederick S. Lyon is one of the most prominent patent attorneys in the West. He has engaged exclusively in the patent law business for the past 38 years. He testified that in 1912 at the request of Wagner and Schweitzer he investigated the patentability of the Briterlite invention but that he "did not immediately file an application for a patent for the reason that the law allows an invention to be in use anywhere less than two years without barring the right to a patent." He testified that the only question was whether the Briterlite infringed the Brascolite or Guth patent and as to this he advised Wagner and Schweitzer that there was no infringement. He also testified that the Briterlite invention was particularly valuable since it was the only non-infringing competitive light which,

because of intervening rights, was not excluded from right to patent by a subsequent reissue or amendment of the Guth or Brascolite patent. He also testified as to the installations of and demand for the indirect lighting fixture. [R. 28, 29, 30 to 34; also R. 16.]

The witness Ernest J. Schweitzer, who with Mr. Robert G. Wagner was the co-inventor of the Briterlite fixture, testified that he was then engaged in the business of manufacturing lighting fixtures, had been engaged in that business for the past 18 years and had been employed by others in the fixture business even prior thereto. He testified that he, with Mr. Wagner, invented the Briterlite fixture in 1912, and began manufacturing and selling that fixture the same year. He explained the demand for such a type fixture in 1912 and 1913, the reasons for such a demand, and the only other type of fixture with which Briterlite would have to compete. He also testified as to the cost of the manufacture of the Briterlite fixture, and the price for which it could be sold and the profit which might be expected to be realized from the sale of that fixture. He and Robert J. Wagner sold the Briterlite invention in 1920 for \$85,000. He was qualified to express his opinion of the value of his invention on March 1, 1913, not only as an expert but also as an owner who might be called upon to value his own property. [R. 34 to 51.]

The witness George J. McKenzie testified that he was the manager of the Wagner-Woodruff Corporation, a company which was engaged and had been engaged in the business of manufacturing lighting fixtures. He testified that he was with that corporation for the past

19 years, and that that corporation began selling the Briterlite fixture in 1912. He describes very minutely the Briterlite fixture, explaining its superiority over the other types of fixtures then in vogue. He explained the market and demand for such a fixture in 1912 and 1913, and the reasons for such market conditions. He explained the method used in 1912 and 1913 for determining the sales price for the Briterlite fixtures being manufactured. He expressed his familiarity with the market for such fixture in 1920 as compared with 1913. He was undoubtedly qualified to express his opinion as to the comparative values of the Briterlite invention in 1920 and on March 1, 1913. [R. 51 to 57.]

The witness Max L. Gordon testified that he had been in the lighting fixture business practically all his life; that from the years 1909 to 1912 he was one of the owners of the California Fixture Company, and from 1912 to 1925 was one of the owners of the National Fixture Company; that prior to 1909 he was employed as foreman for the Mission Fixture Company; that he was familiar with all types of lighting fixtures in use in the years 1912 and 1913. He explained the demand prevalent in 1913 and 1914 for indirect lighting fixtures. He testified as to his familiarity with the types of indirect lighting fixtures existing at that time. He testified that he was familiar with the cost of manufacturing lighting fixtures; that he was familiar with the sales prices of the Briterlite fixtures. He was also familiar with the general method of the trade in determining these sales prices of lighting fixtures, and the rate of profit which was realized upon the sale of fix-

tures. He testified that he knew the Briterlite fixture, and was familiar with the existing market or demand for that type of fixture on March 1, 1913. He also explained the superiority of the Briterlite fixture over the other types. Mr. Gordon, as a man who had devoted his entire life to the lighting fixture business, manufacturing and selling fixtures of his own production and also the product of other fixture companies, was sufficiently experienced to be qualified to express an opinion of the value of the Briterlite invention on March 1, 1913. [R. 57 to 65.]

The witness Jerome Fugate testified that he was a partner in the Wagner-Woodruff Company and had been so employed for three years; that for several years prior to that time he was engaged in the business of selling lighting fixtures in Los Angeles and vicinity, and prior to that time he was engaged for himself in the business of designing and manufacturing lighting fixtures in Tacoma, Washington, and prior to engaging in that business he had been employed as manager of the Mullins Electric Supply Co. of Tacoma, Washington. In 1912 and 1913, he was engaged as salesman in the sale of the lighting fixtures for the W. G. Hudson Co. of Los Angeles, and for the years 1909 to 1912, he was employed as traveling auditor for the Capital Electric Company of Salt Lake City, which corporation was engaged in the business of designing, manufacturing and distributing lighting fixtures and supplies. Their distribution consisted in the operation of a chain of 21 retail establishments throughout the states of Utah, Idaho, Montana and Eastern Oregon. Mr. Fugate



testified that he was familiar with the Briterlite fixture in 1913; that it could easily be sold in competition with the Brascolite because of the superior features which it had from a selling standpoint; that he was familiar with the demand for lighting fixtures at that period; explained the reasons for such demand or market; that he could give an opinion as to the value of the Briterlite fixture; and, in answer to counsel's question, showed that he was familiar with the definition of the term, "fair market value." The extent of the experience of this witness, enabling him to become familiar with the demand for lighting fixtures, the prices for which they were being sold, the quality and quantity of the competition to be met by various types of fixtures, the market conditions and the impressions of the trade regarding lighting fixtures, and the opportunity for profit, manufacture and sale of certain types of lighting fixtures, qualify Mr. Fugate as a witness who can express an opinion as to the fair market value of an invention of a new type of lighting fixture with which he was also familiar. [R. 66 to 77.]

The witness Frank N. Cooley testified that he was employed as a lighting specialist for the Graybar Electric Company of Los Angeles; that he had been employed in that position for the past 18 years; that he was so employed in the years 1912 and 1913, although at that time the name of the Graybar Electric Company was the Western Electric Company; that the Western Electric Company was engaged in the lighting fixture business, with an extensive distribution organization in the United States consisting in 1912 and 1913 of

approximately 62 houses and at the present time of 76 houses doing approximately \$90,000,000 to \$100,000,000 a year business. He testified that he had been engaged in the lighting fixture business for the past 30 years. He testified that he was familiar with the lighting systems and lighting fixtures in 1912 and 1913 and with the demand for indirect lighting fixtures during those same years. He explained the reasons for the market conditions in 1912 and 1913. He was familiar with the prevailing rates or royalties at which manufacturing under patent rights were secured in 1912 and 1913. He testified that, although in 1912 and 1913 he was not personally familiar with the Briterlite fixture, he became familiar with that light in the last five or six years, during which time he has had opportunity to examine it and see it in operation. He testified, in response to questions by the Member of the Board, that, although he did not know the comparative qualities of Briterlite with other lighting fixtures in 1912 and 1913, he was satisfied from information which he secured in the last five years that the Briterlite was a better design than the Brascolite and other lights that he had come in contact with at that time. There can be no question but what Mr. Cooley's qualifications were sufficient to entitle him to testify as an expert as to the fair market value of the Briterlite invention on March 1, 1913, and his qualifications were not impaired in any way by the fact that certain data, upon which his value was based, were not within his personal knowledge on March 1, 1913, since by hypothetical question, which was asked him, those factors were given to him as factors which he might consider in his de-

termination of the market value of that invention. [R. 78 to 87.]

In an extreme case, with a state of facts much more unfavorable than those existing in this proceeding, the case of *Joseph H. Adams (supra)*, 23 B. T. A. 71, where patent applications were in a state of rejection in the Government Patent Office on March 1, 1913, the Board, in a lengthy opinion supporting its finding of a March 1, 1913 value for such applications, made the following statements:

“. . . rejections such as had here occurred are not to be considered final and a skilled patent attorney might well have been able to have foreseen the ultimate outcome with a reasonable degree of certainty. . . .” (23 B. T. A. p. 102.)

“The most we can say is that we are satisfied that a willing purchaser, skilled in the art with which we are concerned and fully cognizant of all conditions as they existed and were reasonably contemplated at that time, would have recognized a fair market value attaching to the applications at March 1, 1913.” (23 B. T. A. p. 114.)

“Further, it might be said that, since we have no yardstick by which to measure our value in this case, whatever value we determine in excess of zero and less than \$25,000,000 may be said to contain an element of speculation, but as Judge Learned Hand said in *Cohan v. Commissioner of Internal Revenue*, 39 Fed. (2d) 540, ‘It is not fatal that the result will inevitably be speculative; many important decisions must be such.’ But looking at the situation as it existed on March 1, 1913, and considering all factors, both favorable and unfavorable, as well as certain and uncertain, we have reached the conclusion that the two patent applications in question had a fair market value on March 1, 1913, of \$750,000.” (23 B. T. A. p. 115.)

In this case the Board considered such factors of which we have evidence in the instant proceeding, that is, demand for product, superiority of product, royalty rate, etc. The Board has in other cases, some of which have already been mentioned herein, followed the rule that it must give consideration to evidence such as this and must determine a value proved thereby. Where the Board has failed to follow this rule the U. S. Circuit Courts of Appeal have been quick to correct the Board's errors:

- Royal Packing Co. v. Commissioner*, 22 Fed. (2d) 536-9;  
*Buena Vista Land & Develop. Co. v. Lucas*, 41 Fed. (2d) 131-9;  
*Citrus Soap Co. v. Lucas*, 42 Fed. (2d) 372-9;  
*Commissioner v. Swenson*, 56 Fed. (2d) 544;  
*Chicago Ry. Equipment Co. v. Blair*, 20 Fed. (2d) 10;  
*Bonwit Teller & Co. v. Com.*, 53 Fed. (2d) 381;  
*Boggs & Buhl v. Commissioner*, 34 Fed. (2d) 859;  
*Pfleghar Hardware Specialty Co. v. Blair*, 30 Fed. (2d) 614;  
*Am-Plus Storage Battery Co. v. Commissioner*, 35 Fed. (2d) 167;  
*Kendrick Coal & Dock Co. v. Com.*, 29 Fed. (2d) 559;  
*Heiner v. Crosby*, 24 Fed. (2d) 191;  
*Anchor Co. v. Commissioner*, 42 Fed. (2d) 99;  
*Pittsburgh Hotels Co. v. Com.*, 43 Fed. (2d) 345, 347;  
*Nichols v. Commissioner*, 44 Fed. (2d) 157, 159;  
*Rice v. Commissioner*, 47 Fed. (2d) 99;  
*Tracy v. Commissioner*, 53 Fed. (2d) 575.

Even the fact that an element of speculation may enter into the determination of value has not deterred the Circuit Court of Appeals from requiring the Board to determine a value from the evidence where the evidence is reasonably convincing that a value exists. In the case of *Commissioner v. Swenson*, 56 Fed. (2d) 533, the Circuit Court of Appeals for the Fifth Circuit stated:

“The value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring in the market. That value depends largely on expectations as to what may be realized from the property in the future. (*Ithaca Trust Co. v. United States*, 279 U. S. 151 (Ct. D. 61, C. B. VIII-1, 313).) The fact that those expectations are highly speculative may not keep them from being influential in bringing about a willingness to expend money for the acquisition of the property or an interest in it. Though a venture is as speculative as a lottery, a chance or interest in it may be readily salable for a substantial sum of money. The law does not forbid the recognition of the proved exchangeable value of an asset because of the speculative nature of it. (*Collin v. Commissioner of Internal Revenue*, 32 Fed. (2d), 753.) Furthermore, it did not appear from the evidence that it was mere guesswork to attribute a substantial money value to the shares of stock in question at the time they were received in exchange for an oil and gas lease. \* \* \* The Board’s conclusion that those shares, at the time they were received in exchange for an oil and gas lease, had no fair market value involved a disregard of evidence having a substantial tendency to prove that at that time they had a fair market value.”

**The Honorable Circuit Court of Appeals for the Ninth Circuit Has Consistently Required the Board to Give Due Regard to the Evidence Introduced at the Trial of a Proceeding.**

This Honorable Circuit Court has not hesitated to require strict compliance with this general rule that unimpeached or uncontradicted evidence cannot be disregarded. In the case of *Royal Packing Co. v. Commissioner*, 22 Fed. (2d) 536, the court, in reversing the Board's decision, 5 B. T. A. 55, stated:

“Giving to terms their proper legal significance, vital parts of the Board's decision seem to be irreconcilably inconsistent with each other. It is said that ‘the Universal Packing Company began operations in 1917 and from the beginning was a failure financially’; and that ‘the evidence is clear that the Universal Packing Company became insolvent and ceased to function prior to November 1, 1918, a date within the taxable year.’ And yet it is further stated that ‘there is no convincing evidence that any loss was sustained in that taxable year.’ But how could the stock, and particularly the common stock, of such a corporation, out of business and wholly insolvent, be of any value? And adding to the confusion is the fact that, as we view it, the evidence fails to warrant either of the first two statements. The record may suggest the possibility but it is so meager, disconnected, and altogether inadequate, as to leave the ultimate facts largely to conjecture and speculation. Moreover, if it was intended to hold that ‘there was no convincing evidence that any loss was sustained in the taxable year’ because, as stated, the sale of the assets of the corporation and the ‘final liquidation of its business were not com-

pleted within the fiscal year,' the reasoning is deemed to be invalid.

Upon a review in this class of cases, we are given the 'power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.' Section 1003(b), Revenue Act 1926, pt. 2, 44 Stat. 110 (26 U. S. C. A. Sec. 1226). Questions of fact are exclusively for the Board, except that we may consider whether its findings are supported by any substantial evidence. Senate Committee Report 52, Sixty-ninth Congress, First Session, p. 36.

*We are of the opinion that justice requires a reversal of the decision, and that the case be remanded for hearing; and such will be the order, without costs.*" (Italics ours.)

In the instant case every finding of fact by the Board would, to a reasonable person, indicate that the Briterlite invention had a value on March 1, 1913. There is no specific finding of fact that it had no value, but in the opinion the Board concludes that the evidence does not prove a value. Reference to the source from which the Board made its findings of facts could leave no doubt but that the value was established.

In another case decided by this Honorable Circuit Court, *Buena Vista Land & Development Co. v. Lucas*, 41 Fed. (2d) 131, the court, in reversing the Board's decision, 13 B. T. A. 895, stated:

"It was proved that the land involved in the transaction was worth about \$25,000,000 on March 1, 1913, and was worth as much or more at the time of the settlement. The question with which the

Board of Tax Appeals concerned itself was the relative market value of the property at the time of its sale, or surrender, and its value on March 1, 1913. The Board announced that it would fix the tax upon the difference between the two.

It was thus the duty of the Board of Tax Appeals to ascertain the value of the property disposed of June 28, 1921, as of the date of March 1, 1913 (section 907(b), 44 Stat., Chap. 27, pp. 9, 107), and fix the same in its findings. This the Board failed to do and for this error its decision must be reversed. *Kendrick Coal & Dock Co. v. Commissioner of Internal Rev.* (C. C. A.) 29 F. (2d) 559; *Pfleggar Hdw. Specialty Co. v. Blair* (C. C. A. 2) 30 F. (2d) 614; *Chicago Ry. Equip. Co. v. Blair* (C. C. A. 7), 20 F. (2d) 10. \* \* \*

*“When the taxpayer established the fact that its rights were the same on both dates and the value of the land the same, it has made a prima facie showing that there was no increase in value, and hence no taxable income.”* (Italics ours.)

The synopsis shows that the court concluded—“Taxpayer having established that its rights in and value of land were the same on March 1, 1913, and on date of disposal, made *prima facie* showing of no increase in value.” In this case the only witness who testified in behalf of the petitioner was one of its officers and stockholders. He apparently confined his testimony to the fact and conclusion that the property was equally valuable on March 1, 1913, as in 1921.

In the instant case, the evidence not only shows that circumstances on March 1, 1913, were such as to warrant the conclusion that the Briterlite invention was more



valuable on March 1, 1913, than in 1920, but there is direct and unequivocal testimony supporting that fact. [R. 18, 54, 57, 64, 86.] Under authority of the *Buena Vista Land* case above cited, the disregard of this testimony alone would be sufficient to constitute reversible error.

In the case of *Citrus Soap Co. v. Commissioner*, 42 Fed. (2d) 372, this Honorable Circuit Court again reversed the Board for failure to give proper consideration to the evidence. In that case a witness who was a director, secretary and treasurer of a predecessor corporation testified that the good will acquired by the petitioner from the predecessor company had a value of approximately \$500,000.00. The Board, however, disregarded this evidence and ruled that the good will had no value. This court, in reversing the Board, and in referring to the testimony of the witness above mentioned, stated:

“The foregoing testimony was competent and from a competent source. It was not contradicted by any other testimony. It was not unreasonable or improbable in itself, and, in our opinion, it tended to prove as a matter of law that the good will acquired by the petitioner from its predecessor in interest had a substantial value. What that value was, or the mode or formula by which it should be ascertained, is primarily for the determination of the Board of Tax Appeals.”

As to the other issue involved in the case this court also reversed the Board, stating:

“In reference to the loss sustained through the demolition of the building the Board said:

‘For the reasons heretofore stated, we are unable to determine the cost to the petitioner of the old factory building, and we cannot, therefore, disturb the respondent’s determination as to the amount of the loss sustained in 1920 on the sale thereof.’

The testimony on this issue was unsatisfactory, but such testimony as was given was not contradicted. The witness already quoted testified that the building had a value of \$10,000 at the time of its acquisition by the petitioner, and the amount realized upon its demolition was far below that sum. *And, without further discussing the latter question, we think the ends of justice will be best subserved by referring the case back to the board for a rehearing to determine both issues anew. It is so ordered.*” (Italics ours.)

#### OTHER DECISIONS.

The synopsis of the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Chicago Ry. Equipment Co. v. Blair* as reported in 20 Fed. (2d) 10, shows the ruling of the court reversing the Board (4 B. T. A. 452) upon issues similar to those here involved, to be:

“4. Board of Tax Appeals, created by Revenue Act 1924, Tit. 9, Sec. 900 (Comp. St. Sec. 6371 5/6b), must make a thorough and careful examination of all facts, so as to reach just conclusion between taxpayer and government, *and is not authorized to impose hard or unusual rules, that would exclude evidence competent and material under usual and ordinary rules of evidence*, nor that would afford Board the widest range of discretion.”

“7. Board of Tax Appeals, on appeal from Commissioner’s assessment of additional tax *held* to have

erroneously rejected evidence before it of market value as of March 1, 1913, for purpose of making depreciation allowance, in view of evidence establishing success of operation of taxpayer's business in 1913; it not being necessary that property be for sale before it can have a market value, nor that there shall be known buyer for it." (Italics ours.)

In the case of *Bonwit Teller & Co. v. Commissioner*, 53 Fed. (2d) 381, the Circuit Court of Appeals for the Second Circuit, in reversing the Board (17 B. T. A. 1019), stated:

"The Board's finding of valuation is challenged as an arbitrary figure unsupported by the evidence. The taxpayer alone submitted evidence. Its valuation witness was well qualified as an expert and was thoroughly cross-examined. He expressed the opinion that the lease had a value of \$982,952 on March 1, 1913, and then explained in detail how he arrived at this figure." \* \* \*

"In *Pittsburgh Hotels Co. v. Commissioner*, 43 F. (2d) 345 (C. C. A. 3) the court held that a finding of 2 per cent. depreciation in certain property, in the face of testimony by six experts that 4 per cent. was a fair figure, could not stand when there was nothing in the record to indicate that the Board's estimate was based on facts in the record or on the Board's personal knowledge or experience. Similarly the Board's estimate of the value of good will was upset where several business men had testified to a higher figure and there was no contrary evidence. *Boggs & Buhl v. Commissioner*, 34 F. (2d) 859 (C. C. A. 3). The court said, at page 861: ' \* \* \* While the Board may, as a general principle, reject expert testimony and reach a conclusion in accordance with

its own knowledge, experience, and judgment, yet it must have knowledge of and experience with the particular subject under consideration. There is no evidence that the Board had any independent and personal knowledge whatever of the business, reputation, and good will of the petitioner. Therefore it could not set aside or disregard all the positive and affirmative evidence as to the value of the good will, and base its conclusion upon conjecture. *Midland Valley R. R. Co. v. Fulgham* (C. C. A.) 181 F. 91, 95; *DeFord v. Commissioner* (C. C. A.) 29 F. (2d) 532. Consequently it should not have disregarded the only positive and direct evidence as to the value of the good will of the petitioner. Its order will accordingly be modified, and good will allowed to the extent of \$975,000.'

On similar grounds a finding was set aside in *Nichols v. Commissioner*, 44 F. (2d) 157 (C. C. A. 3). *In Dempster Mill Mfg. Co. v. Burnet* (App. D. C.) 46 F. (2d) 604, *there was only one expert witness, and it was held error to disregard his testimony.* There the evidence was thought too inconclusive for the court to direct a finding, and the case was remanded. This we believe to be the proper course to pursue in the present case." (Italics ours.)

These quotations indicate the attitude of the courts to a disregard by the Board of Tax Appeals of competent evidence.

In this proceeding it must be obvious that the Board's findings of facts infer that on March 1, 1913, the Briterlite invention was a valuable invention. The Board was then charged with the duty of determining from the Record the extent of that value. This the Board failed to do and by such failure the Board has disregarded all the evidence and has committed serious error to the detriment of the petitioner.

Argument in Support of Contentions That Board Erred in Sustaining Objections to Evidence as Set Forth in Amended Assignments of Error as Alleged Errors IV to IX, Inclusive.

In the amended assignments of error, which were filed to conform with Rules 11 and 28 of this court, there is set out in full under errors IV to IX, inclusive, the evidence rejected by the Board by its rulings upon objections by counsel for respondent. In setting out these assignments of error it was necessary to include arguments of counsel for the respective parties, so that there appears therein the position of the parties concerning the admissibility of this evidence. Due to the fact that the Board did not indicate its rulings on the evidence until after the statement of evidence was filed in this proceeding, the statement of evidence appearing in the printed transcript of record [pp. 27 to 88] contains in full the same evidence set out in the amended assignments of error. We will not, therefore, repeat those arguments herein, but will devote this section of this brief to support of those contentions.

It is a general rule that the opinion evidence of experts may be used where the thing to which it relates is such that one without particular training or knowledge or experience in connection with that thing will have difficulty in drawing a proper inference from the facts. (*King v. Davis*, 54 App. D. C. 239.)

It is a peculiarity of this kind of testimony that the witness may, but need not, testify from facts within his personal knowledge. An expert witness may testify from facts he knows, from facts which have been stated

to him or given in evidence by others, or from both. The use of hypothetical questions illustrates cases in which the expert testifies from facts derived from others. A hypothetical question must fairly state the evidence or such part thereof as it purports to embrace. (*Horton v. U. S.*, 15 App. D. C. 310; *Snell v. U. S.*, 16 App. D. C. 501; *Guenther v. Metro. R. R. Co.*, 23 App. D. C. 493; *Turner v. A. S. & T. Co.*, 29 App. D. C. 460; *W. A. & Mt. V. R. Co. v. Lukens*, 32 App. D. C. 442; *Magaw v. Huntley*, 36 App. D. C. 26; *Carson v. Jackson*, 52 App. D. C. 51.)

Without doubt, the value of an invention of an indirect lighting fixture is something which cannot be within the knowledge of an ordinary individual. This is a matter concerning which only a person with particular training or knowledge or experience could testify. The only possible source from which such a value could be determined would be the opinions of those who had a superior knowledge of the subject of the valuation, those who by their training and experience would have a knowledge of what such property could have brought in a transaction between a willing buyer and a willing seller.

Every witness introduced in this proceeding was exceptionally well experienced in relation to the business, as it existed on March 1, 1913, of buying, selling and manufacturing of indirect lighting fixtures. Each witness had knowledge of the profits obtainable from that business. Some of the witnesses were acquainted with the prevailing royalty rate for licensing the sale or manufacture of a patented lighting fixture. Each witness was fully familiar with the demand and market on March 1, 1913,

of indirect lighting fixtures. Each witness was competent and qualified to testify to the matters of which they were asked. (See *supra*, pp. 39 to 47.)

In the following discussion we make reference to a number of decisions by the Courts of the District of Columbia. This is done principally for the reason that section 907 of the Revenue Act of 1926 provides:

“The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.”

#### Testimony of Ernest J. Schweitzer.

There is assigned as error No. IV that the Board of Tax Appeals erred in sustaining the objections of counsel for respondent to the admission in evidence of the testimony of the witness Ernest J. Schweitzer, co-inventor with Robert G. Wagner of the Briterlite invention, concerning the fair market value on March 1, 1913, of said Briterlite invention, and as error No. V that the Board of Tax Appeals erred in rejecting as evidence the testimony of the witness Ernest J. Schweitzer, concerning his opinion, as owner of the invention, of the fair market value on March 1, 1913, of the Briterlite invention.

Hereinbefore (*supra*, p. 40) we have touched upon the qualifications and competency of this witness to testify as to the March 1, 1913, value of his Briterlite invention. His opinion was solicited as the opinion not only of an expert but also of an owner. A reading of his testimony

seems convincing of his competency as an expert. Not only did he actually have a part in the discovery of the invention but, as was brought out by the Board member by his own interrogation, Mr. Schweitzer and Mr. Wagner were sufficiently informed of the value of their invention *that on March 1, 1913, they placed a value on the invention of \$100,000.* Schweitzer was then engaged in the lighting fixture business and must have known the value of his products. His evidence, corroborated as it is by the testimony of other witnesses and the actual sale of the invention, after patent, should not be ignored.

It has frequently been ruled that an owner is presumed to have sufficient knowledge as to the value of his property that he might express an opinion concerning that value.

*Barrett v. Fournial*, 21 Fed. (2d) 298;

*Hartman v. Ruby*, 16 App. D. C. 45, 55;

*Dobbins v. Thomas*, 30 App. D. C. 511.

We submit that the Board erred in rejecting the testimony of this witness as set out in the assignment of error herein referred to as error IV and V.

### Testimony of Witness George J. McKenzie.

There is assigned as error VI that the Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness, George J. McKenzie, concerning the comparative values of the Briterlite invention in 1913 and in 1920.



The qualifications and competency of the witness to testify has hereinbefore been discussed (*supra*, p. 40). Undoubtedly this witness had such close contact with the lighting fixture business for the past 20 years that he was qualified to express an opinion as to the comparative value in 1913 and in 1920 of an invention of a superior lighting fixture. There can be absolutely no question as to the familiarity of this witness with the lighting fixtures in extensive use in 1913, and with the fact of superiority of the Briterlite over others. The Board accepted this testimony, as can be inferred from its findings of fact, as to the superiority of the Briterlite [Tr. p. 17]. That this evidence of comparison of values is material can best be answered by the fact that the disregard by the Board of just such evidence in the case of *Buena Vista Land & Development Co. v. Lucas* (*supra*, p. 49) was mentioned by this court as one of the grounds for the reversal of the Board's decision.

We submit that the Board erred in rejecting this testimony as set out in the assignment of error herein referred to as error VI.

#### **Testimony of Witness Max L. Gordon.**

There is assigned as error No. VII that the Board of Tax Appeals erred in sustaining the objection of counsel for respondent to the admission in evidence of the testimony of the witness Max L. Gordon, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The qualifications and competency of this witness to testify have hereinbefore been discussed (*supra*, p. 41).

We can conceive of no reason why this witness, who had devoted most of his life to the lighting fixture business, who was operating in 1913 as a competitor of Schweitzer and Wagner, who was personally familiar with the Briterlite as it was being manufactured and sold in 1912 and 1913, can be denied the right to express an opinion of the market value of the Briterlite invention on March 1, 1913.

It is true that he was not engaged in the lighting fixture business at the time of the trial of this proceeding before the Board. But that fact cannot effect his qualifications as an expert. He was engaged in that business on March 1, 1913, and was entirely familiar with conditions of the business as they existed at that time.

A witness may have become qualified by actual experience or long observation without having made a study of the subject. (*Potter v. Grand Trunk R. R. Co.*, 157 Mich. 216; *Greenfield v. People*, 85 N. Y. 75.) On the other hand, he may be an expert, although his knowledge has been derived from the study of the subject and not from actual experience or practice in the business or profession. And if the occupation and experience of the witness have been such as to give him the requisite means of knowledge of the subject, *he may be competent as an expert, although engaged in some other occupation*, or even if he has abandoned the business to which the inquiry relates. (*Wilson v. Bauman*, 80 Ill. 493; *Snyder v. Western Union Ry. Co.*, 25 Wis. 60; *Robertson v. Knapp*, 35 N. Y. 91; *Tullis v. Kidd*, 12 Ala. 648.)

We submit that, because of his actual experience and knowledge, this witness was qualified to express an opinion

of value and that the Board erred in rejecting his testimony as set out in the assignment of error herein referred to as error No. VII.

### Testimony of Witnesses Jerome Fugate and Frank N. Cooley.

There is assigned as error No. VIII that the Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Jerome Fugate, concerning the fair market value on March 1, 1913, of the Briterlite invention, and there is also assigned as error No. IX that the Board of Tax Appeals erred in sustaining the objection of counsel for the respondent to the admission in evidence of the testimony of the witness Frank N. Cooley, concerning the fair market value on March 1, 1913, of the Briterlite invention.

The qualifications and competency of these witnesses to testify has hereinbefore been discussed (*supra*, pp. 42-43).

We wish to point out that, as to the witness Fugate, not only were his qualifications brought out on direct examination, but they were emphasized and strengthened by cross-examination. [Tr. pp. 72 to 77.] In fact, we feel that the examination of this witness on cross-examination was such as to bind the respondent by the witness' answers that the March 1, 1913, value of the Briterlite invention was at least \$100,000.

The assignment of error No. VIII sets out the testimony of this witness Fugate. This testimony also ap-

pears in full on pages 66 to 77, inclusive, of the printed transcript of record filed in this proceeding. The assignment of error No. IX sets out the testimony of the witness Cooley. This testimony also appears in full on pages 78 to 87 of the printed transcript of record.

It appears that counsel for respondent objected to the use of hypothetical questions.

It has been held that it is not necessary that an expert should have seen the property or article in question or have personal knowledge concerning it. (*Stone v. Covell*, 29 Mich. 359; *Slocovich v. Orient Ins. Co.*, 108 N. Y. 56; *Rush v. Wood*, 34 Pa. St. 451.) His knowledge may be gained by having dealt in similar property, although at another place (*Hangen v. Hachemeister*, 114 N. Y. 566; *Seattle R. Co. v. Roeder*, 30 Wash. 244), or from the description of the articles by other witnesses, and hypothetical questions he may be asked based on such descriptions. (*Alabama Consol. Coal, etc., Co. v. Turner*, 145 Ala. 639; *Burr's Ferry, etc., Ry. Co. v. Allen* (Tex.), 164 S. W. 878.) *Anyone who has a special and peculiar knowledge of the subject may testify.* (*City of Baltimore v. Yost*, 121 Md. 366; *Bristol Co. Bank v. Keavy*, 128 Mass. 298.)

A witness has been held qualified to testify as to value of land if he has had an opportunity of forming a correct opinion as to its value. (*Central Ga. Power Co. v. Cornwall*, 129 Ga. 1.) It is not essential that the witness should have bought or sold land in that vicinity, or that he should have known the actual sales of such tracts as the one in question. The essentials are: "First, a knowl-

*edge of the intrinsic properties of the thing; secondly, a knowledge of the state of the markets.”* (Wharton, *Evidence*, sec. 447; *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 475.)

Experts may be called upon to give an opinion on something not within their personal knowledge or on an assumed state of facts. *This assumed state of facts may be placed before the witness by hypothetical questions.* As to the form of the question, it should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. (*Denver R. Co. v. Roller* (9th Circ.), 100 Fed. 738; *Davidson v. Laughlin*, 138 Cal. 320.) It is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory. (*Denver, etc., R. Co. v. Roller*, 100 Fed. 738 (9th Circ.); *Filer v. New York Ry. Co.*, 49 N. Y. 42.)

The witness Fugate was asked the following question [Tr. p. 69]:

“By Mr. Koster:

Q. Assuming that you had, or that you could purchase at March 1, 1913, or thereabouts, a right, a patent or an invention, together with the exclusive right to manufacture and sell that patent or invention covering a lighting fixture, which was superior to Brascolite at that time; what would you consider, or what in your opinion would be the fair market value of a product (property) at that time, of the product (property) that was being offered to you for sale or for purchase?”

This hypothetical question assumes first that the Briterlite was superior to the Brascolite and, second, that the Briterlite invention on March 1, 1913, was such a property right that a purchaser of it could have secured patent or could have obtained exclusive rights to manufacture and sell the invented article.

Either due to the excitement of the constant argument in the case or slips in stenographic reporting, the question may not appear as clearly worded as it should have been. However, the witness heard the argument of counsel just preceding the question, and his answer, together with his explanation of his answers, as fully covered by his cross-examination [Tr. pp. 72-77] can leave no doubt that he correctly interpreted the question and gave competent answers directly relevant and material to the issue involved.

Since the Board found as a fact that the Briterlite was superior to the Brascolite and this finding is undoubtedly supported by the evidence, the question is not faulty by presenting such superiority as a fact to be assumed in making answer to the question.

We have endeavored hereinbefore to show that the Briterlite invention carried with it on March 1, 1913, the right to exclusive use (*supra*, p. 16) and we rely upon that showing as support for inclusion in the question, the assumption as a fact that the invention did carry with it such exclusive use.

A peculiar question arises in connection with the cross-examination. If the testimony on direct examination as to value was rejected, then the testimony on that question

upon cross-examination has the same effect as though the witness were the witness for the respondent, and the respondent is bound by his testimony. "It is in the discretion of the court to permit the defendant, upon cross-examination of the plaintiff's witnesses, to examine them in relation to matters not touched upon in the direct examination, but as to such matters the defendant, by so doing, makes the witness his own." *Chicago Ex. Bldg. Co. v. Merchants Bldg. Imp. Co.*, 83 Ill. App. 241: "To cross-examine a person as to matters about which he has not testified in chief is, in effect, to make said person a witness for the party cross-examining, and to waive an objection as to his competency." (*Miller v. Miller's Adm., et al.*, 92 Va. 510, 23 S. E. 891; see, also, Cal. C. C. P., sec. 2048.) It seems that the testimony on cross-examination was so strong that the least effect it could have would be to strengthen the direct examination and correct any deficiencies. A few of the answers of the witness on cross-examination are more forceful than any further argument we can present:

"By Mr. Wilson:

Q. What do you mean by 'fair market value'?

A. I would say by 'fair market value' the price at which an article could be sold to a concern for the promotion or manufacture of it, and price that they would be willing and ready to pay for such a right to manufacture.

By Mr. Wilson:

Q. Now, keeping out of your mind, Mr. Fugate, the information and knowledge you have at the present time with regard to this development of this Briterlite and Brascolite, and putting yourself—plac-

ing yourself back, figuratively speaking, to on or about March 1, 1913, do I understand you to testify that you would have on that date—you would have been willing on that date to have paid one hundred thousand dollars for the Briterlite invention? A. I did.

\* \* \* \* \*

By Mr. Wilson:

Q. All right, now, let us understand each other; this statement you made that in your opinion the fair market value of that invention on March 1, 1913, was one hundred thousand dollars, that statement is predicated, is it not, Mr. Fugate, on the assumption that the invention on that date carried with it the exclusive right to manufacture—in other words, a patent? A. *A patent, or the fact that this invention, the idea, was patentable.*”

The witness, Frank N. Cooley, was first asked the following question [Tr. p. 79]:

“By Mr. Koster:

Q. Assuming that you were able to purchase an invention with the exclusive rights to manufacture and sell the product covered by that invention, and that invention was of an indirect lighting fixture which was superior at that time, and by ‘that time’, I mean on or about March 1, 1913, to the other indirect lighting fixtures with which it might compete. What would you—what, in your opinion, would be the fair market value of such an invention with the rights—exclusive rights—pertaining thereto, be as of March 1, 1913?”

After objection and argument and the witness’ response, solicited by the Board member, that he had not



become familiar with the Briterlite fixture until about five or six years ago, the question was reframed and asked as follows [Tr. p. 81]:

“By Mr. Koster:

Q. Assuming that the Briterlite invention carried with it the exclusive rights to manufacture and sell the Briterlite fixture, which was a lighting fixture superior to other indirect lighting fixtures in existence on or about March 1, 1913, what in your opinion would be the fair market value as of March 1, 1913, of that Briterlite invention?”

As in the question propounded to the witness, Fugate, this question assumed as facts first that the Briterlite invention on March 1, 1913, carried with it the right to exclusive use and second, that the Briterlite was a superior fixture to those most prominently in use on that date. As hereinbefore argued, we feel these facts are established by the evidence introduced before the witnesses Fugate and Cooley were called upon to testify, and we urge that the questions were proper. (See *Empire Machine Co. v. Commissioner*, 16 B. T. A. 1099, 1109). After considerable argument the Board Member asked the following questions concerning the question above quoted [Tr. pp. 84-85]:

“By the Member:

Q. I will ask you now, can you answer that question,—I am not asking you to answer it at present; I am asking you to tell me whether you can answer it or not. A. Yes.

Q. Do you know whether or not the Briterlite was superior to the other makes of light that you state were being manufactured in 1912 and 1913,

with which you were then familiar? A. From information which I have had in the last five years, I believe that the Briterlite is of better design than the Brascolite or other lights that I had come in contact with up to that time.”

After the witness had expressed his opinion that the value was \$300,000 and gave his reasons for his opinion, the Board member inquired whether that was the value on March 1, 1913, to which the witness responded [Tr. p. 86]:

“A. Yes, because that was the time when it was very valuable; it is not now, because of all the competition.”

The cross-examination of this witness did not in the slightest, impeach or weaken the testimony of this witness, and in fact the information adduced on cross-examination supported the direct testimony. [Tr. pp. 86-87.]

“By Mr. Wilson:

Q. If there had been on March 1, 1913, any doubt as to the possibility of securing patent, or if at that time no application for patent had ever been filed, would that make any difference in the valuation, in your opinion? A. Yes, sir, I should want to be assured of the exclusive right to manufacture.

By the Member:

Q. Now, the value you gave is your opinion of the value as of March 1, 1913, is that right? A. Yes, Your Honor.

Q. And you assume that the article that was described to you was being manufactured on or about March 1, 1913? A. Yes, Your Honor.

Q. And did you give your opinion of the value in the light of conditions that existed on March 1, 1913, in this line of business? A. Yes, Your Honor.”

We submit that the Board erred in rejecting the testimony of the witnesses Fugate and Cooley as set out in the assignments of error numbers VIII and IX.

In concluding this section of this brief, we respectfully submit the following quotation from the United States Supreme Court decision in the case of *Montana Ry. Co. v. Warren*, 137 U. S. 350, in which the court analyzes the admissibility of testimony regarding market value and we respectfully submit that the evidence in this proceeding is admissible under the Supreme Court’s decision:

“. . . That his mining claim, which may be called ‘only a prospect,’ had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such ‘prospects’ are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. *And yet, uncertain and speculative as it is, such ‘prospect’ has a market value;* and the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. *In respect to such value,*

*the opinions of witnesses familiar with the territory and its surroundings are competent.* At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. *Here, as elsewhere, we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject; but their contention is, that the witnesses permitted to testify had no such sufficient knowledge.* It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. *Stillwell & B. Mfg. Co. v.*

Phelps, 150 U. S. 520 (32;1035); Lawrence v. Boston, 119 Mass. 126; Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544. The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. *After a witness has testified that he knows the property and its value, he may be called upon to state such value.* The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. *And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence.*

“We think the Supreme Court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses. These are all the questions submitted to that court; and its ruling in respect thereto being correct, its judgment is affirmed.” (Italics ours.)

### Conclusion.

In conclusion, we respectfully urge that the Board erred in disregarding the entire evidence adduced by the petitioner, and that its findings of facts and decision are not supported by the evidence which shows conclusively that the Briterlite invention had a fair market value on March 1, 1913; and we respectfully pray that this Honorable Court remand the proceeding to the Board with directions to find a value of \$100,000.00 for the Briterlite invention as of March 1, 1913, which is the value claimed by the petitioner though there is some evidence indicating a much higher value; or, that this Honorable Court grant such other relief as it may seem proper in order that the interests of justice may be best served.

Respectfully submitted,

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